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PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name GZIKOWSKI JOHN
 (Last) (First) (Initial)

Prisoner Number D-00666

Institutional Address IRONWOOD STATE PRISON, P.O. Box 2199,
Blythe, CA 92226-2199

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

JOHN GZIKOWSKI
 (Enter the full name of plaintiff in this action.)

vs.

DEBRA DEXTER, Warden

(Enter the full name of respondent(s) or jailor in this action)

CV } 08 3652

Case No. _____
 (To be provided by the clerk of court)

**PETITION FOR A WRIT
 OF HABEAS CORPUS**

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

- (a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

San Francisco Superior Court San Francisco

Court

Location

- (b) Case number, if known 97078

- (c) Date and terms of sentence Two 7-years-to-Life terms

- (d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes XX No

Where?

Name of Institution: Ironwood State Prison

Address: P.O. Box 2199, Blythe, CA 92226-2199

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

(1) Murder 1st degree & use of firearm, PC §§ 187 & 12022.5

(2) Murder 1st degree & use of firearm, PC §§ 187 & 12022.5

3. Did you have any of the following?

Arrestment: Yes XX No

Preliminary Hearing: Yes _____ No XX

Motion to Suppress: Yes _____ No XX

4. How did you plead?

Guilty XX Not Guilty _____ Nolo Contendere _____

Any other plea (specify) _____

5. If you went to trial, what kind of trial did you have?

Jury _____ Judge alone _____ Judge alone on a transcript _____

6. Did you testify at your trial? Yes _____ No _____

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes xx No

(b) Preliminary hearing Yes _____ No _____

(c) Time of plea Yes XX No

(d) Trial Yes _____ No _____

(e) Sentencing Yes XX No

(f) Appeal Yes _____ No _____

(g) Other post-conviction proceeding Yes _____ No _____

8. Did you appeal your conviction? Yes _____ No XX

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes _____ No _____

Year: _____ Result: _____

Supreme Court of California Yes _____ No _____

Year: _____ Result: _____

Any other court Yes _____ No _____

Year: _____ Result: _____

(b) If you appealed, were the grounds the same as those that you are raising in this

1 petition? Yes _____ No _____

2 (c) Was there an opinion? Yes _____ No _____

3 (d) Did you seek permission to file a late appeal under Rule 31(a)?

4 Yes _____ No _____

5 If you did, give the name of the court and the result:

6 _____

7 _____

8 9. Other than appeals, have you previously filed any petitions, applications or motions with respect to
9 this conviction in any court, state or federal? Yes XX No _____

10 [Note: If you previously filed a petition for a writ of habeas corpus in federal court that
11 challenged the same conviction you are challenging now and if that petition was denied or dismissed
12 with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit
13 for an order authorizing the district court to consider this petition. You may not file a second or
14 subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28
15 U.S.C. §§ 2244(b).]

16 (a) If you sought relief in any proceeding other than an appeal, answer the following
17 questions for each proceeding. Attach extra paper if you need more space.

18 I. Name of Court: San Francisco Superior Court

19 Type of Proceeding: State Habeas Corpus

20 Grounds raised (Be brief but specific):

21 a. Denial of Parole by Calif. Board of Prison Terms

22 b. _____

23 c. _____

24 d. _____

25 Result: Denied Date of Result: Approx. 2000

26 II. Name of Court: San Francisco Superior Court

27 Type of Proceeding: State Habeas Corpus

28 Grounds raised (Be brief but specific):

1 a. Denial of Parole arbitrary, biased, denial of
 2 b. due process of state and federal constitutions.
 3 c. BPH rarely grants parole, violates due process.
 4 d. Continued imprisonment violates Eighth Amend.
 5 Result: Denied Date of Result: 1/4/08

6 III. Name of Court: Calif. Court of Appeal, 1st App. Dist.
 7 Type of Proceeding: State Habeas Corpus Petition
 8 Grounds raised (Be brief but specific):
 9 a. Same as A thru D above.

10 b. _____
 11 c. _____
 12 d. _____
 13 Result: Denied Date of Result: March 2008

14 IV. Name of Court: California Supreme Court
 15 Type of Proceeding: Petition For Review
 16 Grounds raised (Be brief but specific):
 17 a. Same as A thru D above.
 18 b. _____
 19 c. _____
 20 d. _____
 21 Result: Denied Date of Result: 6/18/2008

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?
 23 Yes _____ No XX

24 Name and location of court: _____

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to
 27 support each claim. For example, what legal right or privilege were you denied? What happened?
 28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: See following Page 6A

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7 Supporting Facts:

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11 Claim Two: See following Page 6C

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13 Supporting Facts:

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17 Claim Three: See following Page 6D

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19 Supporting Facts:

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23 If any of these grounds was not previously presented to any other court, state briefly which
24 grounds were not presented and why:

Continued from Page 6 of PET. FOR WRIT OF HAB. CORPUS:

GROUND ONE: Petitioner is entitled to release because the California Board of Parole Hearings ("Board") decision denying parole was biased, arbitrary, unreasonable, unsupported by evidence, and was made without affording him individualized consideration, in violation of [Penal Code] Section 3041 and the Due Process and Cruel and Unusual Punishment Clauses of the California and U.S. Constitutions.

Supporting Facts: As petitioner's record demonstrates, there is no rational basis supporting the Board's latest refusal to parole him. The Executive making parole decisions violates due process where the decision is unsupported by some evidence or "otherwise arbitrary". Otherwise arbitrary would include a biased decision maker; a conclusion to deny parole citing "evidence" that has no reasonable connection or rational relationship to the conclusion reached, i.e., that the prisoner currently presents an unreasonable threat to the public if released; or a failure to duly consider an application for parole based on the applicable criteria and the individual characteristics of each case.

The Board is biased against granting parole. Petitioner was deprived of state and federal due process because the Board is biased against granting parole to life-sentenced prisoners. As set forth in the [state] petition, the actual parole release rate for life-term prisoners in California is approx. 1 percent. When only 1% of all life prisoners actually parole, no matter how long they've been in prison, how mitigated their offences, and how consistently they have demonstrated rehabilitation - in the face of the direction of [P.C.] section 3041 - the bias of the Executive against granting parole is demonstrated.

Petitioner falls into the category of cases where the offense is not particularly egregious, and in light of his now 30 years in prison, his progress and rehabilitation, his age, his insight and understanding, his extensive self-help, and support and parole plans, denial of parole now indicates the Executive has converted the sentence in all but name to one of life without parole. This was not the sentence imposed.

Petitioner's prior record does not support a denial of parole 28 plus years later. The Board cites petitioner's commitment acts and threat to society as a reason to deny parole. The crime referred to by the Board took place 28 plus years before the 2007 hearing. The staleness of that prior record in light of petitioner's exemplary record of rehabilitation in the intervening 28 years no longer constitutes "some evidence", or a rational basis, that he currently presents an unreasonable risk of danger to the public if released.

The Commitment Offense does not provide evidence that petitioner is current;y an unreasonable threat to public safety. The Board concluded that the offense was carried out in an especially cruel and callous manner and the motive of the crime was inexplicable or trivial in relationship to the offense. The evidence does not support these conclusions.

The motive was neither inexplicable or trivial. However misguided, petitioner believed the victims were a threat to himself and his family, and was under the stresses of being unemployed with the arrival of a new baby he could not support. Petitioner armed himself to protect himself, the Board assumed the foregoing as true, yet still found the motive to be inexplicable or trivial. Fear for one's life cannot be called inexplicable or trivial, even if the perception was inaccurate. None of this indicates that petitioner remains an unreasonable risk of danger to the public if released.

The finding of lack of insight and recent gains is unsupported by reliable evidence in the record. For many years psychological evaluations have found that petitioner expresses remorse and accepts responsibility for the offense has articulated causes for his behavior, i.e., insight and understanding. Licensed psychologists therefore conclude that he would pose a low degree of threat to the public if released. The understanding shown by petitioner at the hearing constituted evidence that he does have the insight the Board finds to be important. Based on the record as a whole and psychological reports, he poses less of a risk for violence than the average citizen, which does not constitute some evidence to deny parole.

The Board failed to duly consider all the factors in petitioner's case in determining his current risk of dangerousness. As example, his age, then 57, in light of his behavior and rehabilitation over the prior 28 years indicates he poses a miniscule risk of danger to the public if released. Petitioner had solid parole plans which were discredited because he did not have a job or actual housing, despite the fact that his attorney stated that both would be provided immediately upon his release.

Petitioner's record shows lack of a juvenile record, one prior conviction of a non-violent offense, stable family upbringing, Honorable Discharge from the U.S. Marine Corps, and favorable psychological evaluations for the prior 28 years received no mention by the hearing panel in the decision. His self-help/therapy activities while incarcerated have been extensive, but merited faint mention; likewise his accomplishment and job skills in machine maintenance and welding. The Board did not question his expressions of remorse, responsibility and understanding that he has expressed for almost three decades, yet these also fall be the wayside in the panels decision.

The Presiding Commissioner admonished him to "continue to program", ignoring the prior 28 years of programming and the fact that the facility offered nothing new. Both panel members admonished petitioner for having a "bad attitude", also cited by the Superior Court Judge in his denial of the state petition as a major reason for the unsuitability finding. The Panel and Judge both fail to note that petitioner had been deprived of his attorney visit prior to the hearing and the fact that he was, for the first time at a parole hearing, placed in chains, handcuffs, and leg shackles for this appearance. Use of mechanical restraints at a parole hearing without cause violates a standing order of the state Superior Court. His so-called attitude stemmed from the physical pain and humiliation he endured, and the recognition of the utter futility of this so-called parole hearing. The Board failed to provide any individualized consideration to which he is entitled under state and federal due process standards.

GROUND TWO: The Board's practice of rarely granting parole deprived petitioner of his right to parole under P.C. § 3041 and violated the Due Process clauses of the California and U.S. Constitutions and warrants issuance of an injunction that requires the Board to comply with the Legislature's mandate to normally set a parole date when it considers a prisoner for parole.

Supporting Facts: The Board's denial of petitioner's parole is arbitrary for reasons independent of the lack of evidence to support it. It is the product of bias and a refusal to fairly assess petitioner's potential risk to public safety according to the statutory framework and administrative rules adopted to implement that design.

The Board may not replace the legal standards for parole with its own personal and political ones. The "some evidence" standard is only one aspect of judicial review for compliance with minimum standards of due process. The right to an impartial and disinterested decision maker who fairly considers the parole of a prisoner under the established legislative framework is also part of the fundamental guarantee against arbitrary and capricious government conduct.

The denial of parole may not be inconsistent with the statutory requirement that a parole date shall normally be set, and the exception to the requirement of setting a parole date should not operate so as to swallow the rule that parole is "normally" granted. After [now] 30 years, petitioner should have normally been granted parole.

GROUND THREE: Petitioner's continued imprisonment violates the Cruel and Unusual Punishment prohibitions in the State and Federal Constitutions.

Supporting Facts: Punishment arbitrarily imposed or which serves no legitimate penological purpose may be cruel and unusual in violation of the Eighth Amendment. Even where a particular punishment in the abstract is not cruel and unusual, the method of imposing it can be. Based on the staleness of petitioner's offense and his development in prison since, the continued refusal of the State to release him to parole has now ripened into a due process violation, as well as disproportionate punishment, constitution cruel and unusual punishment.

The California Supreme Court has recognized that a life-sentenced prisoner whose punishment has become disproportionate to his offense and culpability, makes a showing that the punishment has become cruel and unusual. For all the foregoing reasons, petitioner's continued incarceration has reached that point.

Additionally, the last reasoned state court decision was made without reference to, or consultation of the cumulative record of petitioner's incarceration. So-called "findings" by the state court are, as the Board findings, in error of fact and law, therefore requiring the granting of relief to the petitioner.

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1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases:

4 See Following Page 7A.
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7 Do you have an attorney for this petition? Yes_____ No XX

8 If you do, give the name and address of your attorney:
9

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12
13 Executed on 7-15-2008

14 Date

John Gzikowski

Signature of Petitioner

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20 (Rev. 6/02)
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Continued From Page 7 of PET. FOR WRIT OF HAB. CORPUS

Wolff v. McDonnell, 418 U.S.539, 558 (1974)

Hicks v. Oklahoma, 447 U.S. 343 (1980)

Superintendent v. Hill, 472 U.S. 445, 456-457 (1985)

Daniels v. Williams, 474 U.S. 327, 331 (1986)

Board of Pardons v. Allen, 482 U.S. 369 377-378 (1987)

Maynard v. Cartwright, 486 U.S. 356 (1988)

Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, (9th Cir.1981)

Powell v. Gomez, 33 F.3d 39, 40 (9th Cir.1994)

McQuillon v. Duncan, 306 F.3d 895, 901-902 (9th Cir.2002)

Biggs v. Terhune, 334 F.3d 910, 913 (9th Cir.2003)

Sass v. Board of Prison Terms, 461 F.3d 1123 (9th Cir.2006)

Martin v. Marshall, 431 F.Supp2d 1038, 1047-48 (N.D.Cal.2006)

Rosenkrantz v. Marshall, 444 F.Supp2d 1063, 1084-1085

(C.D.Cal.2006)

People v. Superior Court (Engert), 31 Cal.3d 797, 801-802 (1982)

In re Rosenkrantz, 29 Cal.4th 616, 654, 658 (2002)

In re Dannenberg, 34 Cal.4th 1061, 1084 (2005)

In re Martin, Sacramento Superior Court Case # 03F10202,

Order of Oct. 13, 2004

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MAIL

U.S. MARSHALS SERVICE

INSPECTED BY

JUL 3 8 2008

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
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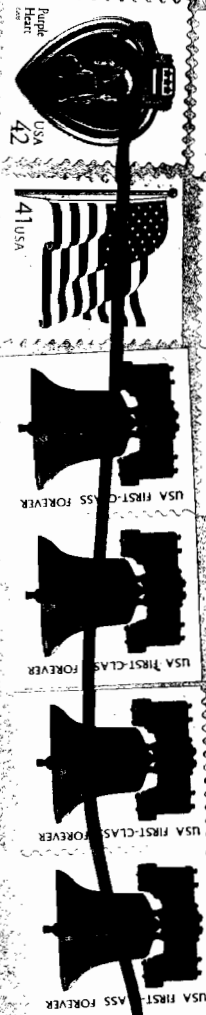
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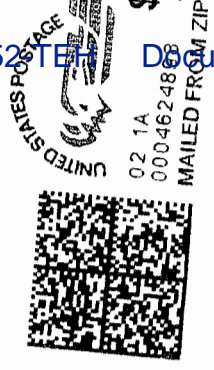
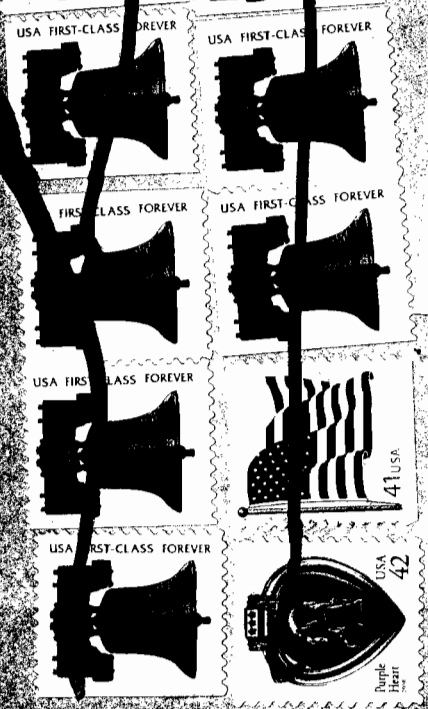


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JOHN GZIKOWSKI D-00666
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P.O. Box 2199
Blythe, CA 92226-2199

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THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
450 GOLDEN GATE AVE.
P.O. Box 36060
SAN FRANCISCO, CA 94102

